United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7669

To be argued by
LESLIE D. CORWIN

United States Court of Appeals
FOR THE SECOND CIRCUIT

WEITNAUER TRADING COMPANY LTD.,
Plaintiff-Judgment Creditor-Appellee,

—against—

MORTON L. ANNIS,
Defendant-Judgment Debtor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-JUDGMENT DEBTOR-APPELLANT

RICH KRINSLY POSES KATZ & LILLIENSTEIN
Attorneys for Defendant-Judgment Debtor-Appellant
99 Park Avenue
New York, New York 10016
867-7200

NORTON I. KATZ
LESLIE D. CORWIN
Of Counsel

TABLE OF CONTENTS

Table of Authorities Cited

Cases: PAGE

United States Court of Appeals

FOR THE SECOND CIRCUIT

WEITNAUER TRADING COMPANY LTD.,

Plaintiff-Judgment Creditor-Appellee,

—against—

MORTON L. ANNIS,

Defendant-Judgment Debtor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-JUDGMENT DEBTOR-APPELLANT

Preliminary Statement

This is an appeal by the Defendant-Judgment Debtor-Appellant from an order of the United States District Court for the Southern District of New York, which order was filed and entered on October 30, 1975 (A 332)* pursuant to a memorandum and opinion dated October 1, 1975 and filed October 6, 1975 of the Honorable Robert L. Carter, District Judge (A 307-329). That opinion directed the parties to settle an order on 10 days notice.

---

* References to pages of the Appendix are hereinafter designated by the prefix (A).

The Appellant appeals to this Court from so much of the order as directs the Appellant to pay by bank or certified check to the order of Lankenau, Kovner & Bickford as attorneys for judgment creditor in each and every month, on the first day thereof, for a five year period calculated from May 1, 1975: (a) *Principal,* the sum of $3,000 against the principal amount of the judgment, $182,065.44, and (b) *interest,* monthly interest of $1,253.93, making the aggregate monthly installments $4,253.93 per month; and which further directs the defendant-judgment debtor to pay, by bank or certified check to the order of Lankenau, Kovner & Bickford, as attorneys for judgment creditor; (c) on or before October 31, 1975, the aforesaid installment payments for the months of May, June, July, August, September and October, 1975 aggregating $25,523.58, from the sum of $26,041.67 previously accrued by General Cigar Corp., for his benefit; and (d) on June 1, 1980, a final installment payment in the sum of $2,075.77. Said Notice of Appeal was filed on November 24, 1975 (A 344).

As background for this appeal, it should be noted that on June 19, 1974, the Appellee secured a judgment against the Appellant for $182,065.44 in an action upon a guarantee. On September 11, 1974, a modified judgment was entered for the same amount. The judgment was affirmed by this Court on May 28, 1975 in an opinion reported at 516 F. 2d 878. The order appealed from herein directs the Appellant to make monthly installment payments of $4,253.93* over a five year period until satisfaction in full of his liability as a judgment debtor on the above judgment is made (A 331).

---

* For an explanation of how the interest portion of the order was calculated see (A 335-336).

On October 7, 1974, in a proceeding supplementary to and in aid of its judgment, Appellee's attorneys issued a restraining notice ex parte to General Cigar Corporation (hereinafter called "General Cigar") pursuant to CPLR §5222, restraining General Cigar from transferring to Appellant any money or property due or to become due to Appellant (A 12-13). By letter dated October 14, 1974 (A 36), Max B. Meyer, Vice-President and Secretary of General Cigar, notified Appellant that because of the restraining notice, General Cigar was refusing to continue making payments to Appellant pursuant to their consulting agreement dated June 10, 1971 (A 46-49). General Cigar then began escrowing Appellant's semi-monthly payments commencing with the installment due October 15, 1974 (A 44).

On January 8, 1975, Appellant moved to vacate the restraining notice issued to General Cigar on the ground that it was improper (A 5-13). Said motion was submitted to the District Court on January 24, 1975 without oral argument. Appellee put in an affidavit in opposition to defendant's motion (A 15-19).

In the interim, between the date of the filing of the motion and the date of its submission to the Court, on or about January 21, 1975, a transcript of the judgment was docketed in the Office of the County Clerk, in New York County.

On or about February 21, 1975, Appellee's counsel issued *ex parte* an "execution with notice to garnishee" to General Cigar against "monies past due pursuant to consulting agreement". The Sheriff for New York County served the execution on General Cigar on or about February 26, 1975. On April 23, 1975, there was entered in the District Court an order with memo endorsement denying Appellant's

motion to vacate the restraining notice of October 7, 1975* (A 14).

The discrepancy in the date of the actual order of the District Court denying the Appellant's motion to vacate the restraining notice to General Cigar becomes highly significant in view of the fact that it was the denial of that motion that made it necessary for Appellant to have an order to show cause signed by Judge Carter on April 30, 1975 (A 21) for the express purpose of moving to modify the income execution issued to General Cigar on or about February 26, 1975. Appellant's motion to modify the income execution (A 20) came on to be heard before the District Court on May 1, 1975, at which time, Appellee cross-moved, pursuant to Rule 69 (a) of the Federal Rules of Civil Procedure and New York CPLR §5226, for an installment payment order requiring Appellant to make monthly payments to the Appellee. On May 7, 1975, both the motion and cross motion were fully submitted to the District Court. In support of the motion to modify income execution and in opposition to the cross motion for an installment payment order Appellant submitted an affidavit with exhibits (A 22-28) and a supplemental affidavit (A 72-79). In support of the installment payment order and in opposition to Appellant's motion to modify income execution, Appellee submitted an affidavit with exhibits annexed (A 52-71) and a reply affidavit with exhibits annexed (A 80-86). As exhibits to its initial affidavit, Appellee submitted two depositions of the Appellant conducted January 31, 1975, and April 4, 1975 (A 87 through A 306).

---

* It should be noted for the record, that the Court in its opinion of October 1, 1975 erroneously refers to its order denying Appellant's motion to vacate the restraining notice as having been rendered May 28, 1975 (A 316). As appears from the docket entries in the District Court (A 3) and the actual order itself (A 14) said decision was rendered on or about April 23, 1975.

On his motion, Appellant characterized the February 21, 1975 execution as "an income execution" issued pursuant to CPLR §5231 (and, therefore, subject to the 10% limitation of that section) Appellant contended that only 10% of the General Cigar monthly payments or $208.30 was subject to execution. Appellant argued that the payments made by General Cigar to him must be deemed wages or earnings and that the Appellee had no right to cause General Cigar to refuse to make payments to him and to accumulate past due funds. In opposition to Appellant's motion to modify the income execution, Appellee argued that the execution of February 21, 1975 was issued not under CPLR §5231 (A 26), but under CPLR §5230 which is not, by any express terms, limited to 10% of the Appellant's earnings. Furthermore, Appellee argued that the general exemption of CPLR §5205 (e) (2) (A 311) was inapplicable since the payments made to Appellant under his consulting agreement with General Cigar of June 10, 1971 were not "earnings", and even if they were earnings, any services rendered by Appellant were not rendered within 60 days before delivery of the execution to the Sheriff.

In support of the cross motion for an installment payment order pursuant to CPLR §5226, the Appellee principally argued that the Appellant was a man of great wealth and had a substantial annual income. Appellee also argued that the Appellant was attempting to impede Appellee's efforts to collect on its judgment by rendering services without adequate compensation. In order to meet the stringent requirements of CPLR §5226, as to proof of income or assets, Appellee referred extensively to the transcripts of Appellant's depositions of January 21, 1975 and April 4, 1975 (A 87 through A 306) and to a financial statement of the Appellant dated May 30, 1974 (A 61; A 321).

In opposition to Appellee's cross motion for an installment payment order, there was placed in issue the Appellant's ability to meet the requirements of any such order. The affidavit of Leslie D. Corwin, sworn to May 5, 1975 raised the factual issue that the Appellant is semi-retired and for the past year or so had suffered from cancer and had been in and out of hospitals; receives cobalt treatments and has incurred large hospital bills and that the monies he receives from General Cigar are needed so that he can pay his ever increasing medical and hospital bills and provide for the daily necessities of life for him and his family" (A 74).

In further opposition to Appellee's cross motion for an installment payment order, Appellant argued that the District Court was required to be bound by the 25% Federal Garnishment Restriction on disposable earnings imposed under the Consumer Credit Protection Act, 15 USC §§1671-1677 (A 26).

At the time of the submission of Appellant's motion to modify income execution and Appellee's cross motion for an installment payment order, there was submitted by General Cigar an affidavit which outlined the course that it had followed in these proceedings since October 7, 1974 (A 43-49).

In its opinion of October 1, 1975, which was filed and entered in the District Court on October 6, 1975, the District Court held *inter alia*, that the October 7, 1974 restraining notice was improper since issued against wages and earnings of the Appellant and that the execution of February 21, 1975 issued against the fund accumulated by General Cigar as a result of the improper restraining notice was illegal and should be vacated. The District Court reversed its decision of April 23, 1975 denying the Appel-

lant's motion to vacate the restraining notice issued to General Cigar dated October 7, 1974 and recalled said decision. The District Court then went on in its opinion to consider its power under CPLR §5226 to order the Appellant to make specified installment payments and directed that an order be settled on 10 days notice directing Appellant to make installment payments to Appellee of $3,000.00 plus interest per month.

The Court made a finding that the earnings exemption of CPLR §205 (e) (2) was "inapplicable" since the consulting payments are not 'earnings' and, even if they are earnings, any services performed by Annis were not rendered within 60 days before * * * a motion to secure the application of Annis' earnings to the satisfaction of the judgment" (A 311). No proof was taken or submitted with respect to the facts so found.

Pursuant to the District Court's opinion, the Appellant submitted a proposed order (A 337) and accompanying affidavit (A 339), and Appellee submitted a proposed counter order (A 330) and accompanying affidavit (A 333).

On October 28, 1975, Judge Carter signed the counter order and the said counter order was filed and entered in the District Court on October 30, 1975.

The Questions Presented

1. Was there sufficient evidence before the Court below to warrant the granting of its installment payment order? The Court below held that there was (A 318). Appellant contends that there was a failure of such evidence.

2. Was the Court below correct in ordering the Appellant to make installment payments retroactively from the

date of the original motion (May 1, 1975)? Appellant contends that that portion of the Court's order that provided for retroactive payments to May 1, 1975 was without authority in law and had no support whatsoever in the record or in the District Court's opinion.

3. Was the installment payment order limited by the Federal Garnishment Laws, the Consumer Credit Protection Act, 15 USC §§1671-1677? The Court below held that it was not (A 327). Appellant contends that that finding was erroneous as a matter of law.

4. Was the installment payment order of the Court below defective because it directed the Appellant to pay money to the Appellee which was not conditioned on the receipt of income? The Court below answered this question in the negative by stating:

> "In meeting his needs, defendant may rely not only on the aforementioned *assets*, but on an income of $60,000.00 per year, including $25,000 compensation from General Cigar and the $35,000.00 in consulting payments from Master Packaging which will be deemed to be received by Annis for purposes of this motion." (Emphasis ours) (A 326)

Appellant contends that the installment payment order of the Court below was defective because it ordered the Appellant to pay installments absolutely and out of "assets" rather than out of income actually received.

POINT I

There Was Not Sufficient Evidence Before the Court Below to Warrant the Granting of Its Installment Payment Order Without Conducting a Hearing or Trial.

Rule 69 (a) of the Federal Rules of Civil Procedure reads in pertinent part as follows:

> "In general. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution *shall be in accordance with the practice and procedure of the state in which the district court is held,* existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable." (Emphasis ours)

The District Court which rendered the judgment is the proper court to entertain proceedings supplementary to and in aid of the judgment or execution. *U. S. ex rel. Marcus* v. *Ford Electric Co.*, 43 F.Supp. 12 (WD Pa., 1942); *Globe Indemnity Co.* v. *Roe*, 37 F.Supp. 761 (SDNY, 1941). And, subject to the proposition that any statute of the United States governs, it is clear that Rule 69 of the Federal Rules of Civil Procedure provides for continuing conformity to State law in determining the availability of final remedies for the enforcement of a judgment. *Moore's Federal Practice* 2d Ed. Vol. 7, §69.04. (1974).

Consequently, the Court below in rendering its decision and issuing its installment payment order was bound by the practice and procedure of the New York Civil Practice Laws and Rules and in particular, CPLR §5226.

CPLR §5226 establishes the procedures to be followed and the standards of proof which must be met before an installment payment order may be issued. The statute requires a notice of motion; proof "that the judgment debtor is receiving or will receive money from any source, or is attempting to impede the judgment creditor by rendering services without adequate compensation"; and consideration by the court of "the reasonable requirements of the judgment debtor and his dependents" as well as the debtor's other judgments, wage assignments and the like. *Uni-Serv Corporation* v. *Linker*, 62 Misc. 2d 861, 311 NYS 2d 726 (Civ. Ct. N.Y., 1970).

The Court below erred in rendering its decision while not sufficiently determining the Appellant's ability to pay. There was no proof in the record as to what monies the Appellant was actually receiving at the time of the motion. No evidentiary hearing was ever conducted to determine the Appellant's earnings, and all that was submitted in support of Appellee's cross-motion for an installment payment order were two attorney's affidavits with exhibits annexed (A 50 and A 80).

Consequently, it is not surprising that the Court below in its decision had to make certain assumptions as to the Appellant's earnings. Even those assumptions were incorrect. One such assumption was that the Appellant had "an income of $60,000.00 per year, including the $25,000.00 compensation from General Cigar and the $35,000.00 in consulting payments from Master Packaging which will be deemed to be received by defendant-appellant for purposes of this motion" (A 326).

The evidence before the Court on the hearing of the motions of May 1, 1975 was totally insufficient to support such a finding. As an example, we have printed as part of

the appendix for the purposes of this appeal a copy of the agreement of July 2, 1973 between Morton L. Annis and Master Packaging, Inc. (A 346-349) (hereinafter referred to as the "Master Packaging Agreement"). The Master Packaging Agreement is part of the records of this Court, having been affixed as an exhibit to the affidavit of LESLIE D. CORWIN, sworn to December 9, 1975 and submitted to this Court on Appellant's Motion to Stay Enforcement of the installment payment order pending the determination of this appeal. We ask the Court to take judicial notice of its own records. The Master Packaging Agreement is also in the record below by reference, in the deposition of Appellant submitted by Appellee (A 129; A 150).

As is evident, the Master Packaging Agreement runs only to July 2, 1978 (A 346) after which time the Appellant will not be entitled to receive anything, let alone the $35,000 he is now entitled to. Consequently, it was error for the Court below to deem Appellant to be receiving an income of $60,000.00 per year for a five (5) year period (A 326) and to base its order of October 30, 1975 on such an assumption.

Furthermore, the Court's order is defective because it bases the terms of its order on the assumption:

> "that the minimum value of Annis's assets is approximately $890,000-$915,000.[19] Annis's liabilities to banks are approximately $100,000-$180,000,[20] and his

---

[19] This assumes that Annis has approximately $120,000 cash (based on the August, 1974 figure); that his interest in the house is worth $100,000-$125,000; that the Master Packaging obligation and stock are worth $50,000 and $300,000, respectively; and that the net value of the Florida Downs stock is $320,000.

[20] The uncertainty concerns the $75,000-$80,000 obligation to Exchange National Bank which may have been taken into account previously when the Florida Downs stock which secures it was discounted.

minimum net worth therefore appears to be in the neighborhood of $700,000-$800,000.[21]

[21] These figures do not purport to be an accurate statement of Annis's net worth. They are merely an attempt to show the order of magnitude of Annis's wealth." (A 325)

One searches the record in vain for an evidentiary basis for these assumptions. The Court relied on a financial statement of the Appellant dated May 30, 1974 (A 321), constructed almost a year and one half, to the day, earlier than the date of entry of the order appealed from, and prior to his hospitalization and treatment for cancer. The financial statement by the Court's own admission is of doubtful current validity (A 322-324) and certainly should have been subject to closer scrutiny than was exercised by the Court below. If anything, the Court below should have at least conducted its own evidentiary hearing to determine the income producing capability of the listed assets.* In sum, the Court should have ordered a trial on the issue of the Appellant's earnings and ability to meet the requirements of an installment payment order.

> "If a dispute arises over any of the facts concerning the debtor's earnings or his reasonable requirements or obligations, they may be tried by the court or before a jury as permitted by CPLR 2218. Similarly, issues of fact may be given to a referee to hear and report, as provided in CPLR 4001; or to a referee to hear and determine, if the parties consent thereto as permitted by CPLR 4317(a)."
>
> Weinstein Korn & Miller, N.Y. Civil Practice, Vol. 6, §5226.11, p. 52-404-405 (1973).

* The Court below apparently recognized the possible inaccuracy, in current terms, of its analysis based on the year-old financial statement, for it followed that analysis with a virtual disclaimer of accuracy (footnote 21, A 325).

> "The judgment debtor as a sentient human being is essential to the proceeding under section 793 of the Civil Practice Act (CPLR §5226). His necessities and those of a family dependent upon him are a substantial element in the procedure under the section. What his necessities are and what his resources are raise issues of fact which in a proper case will have to be tried."
>
> *In re Turner's Estate*, 38 NYS 2d 769 (Surrogate's Ct., N.Y. 1942).

The Court below also exceeded its discretion under CPLR §5226 in dealing with the reasonable requirements of the Appellant and his family. Appellant's motion of May 1, 1975 expressly placed in issue the Appellant's own personal requirements and his ability to meet the terms of an installment payment order. The affidavit of Leslie D. Corwin, sworn to May 5, 1975, stated as follows:

> "For the past year or so, Mr. Annis has suffered from cancer and has been in and out of hospitals. He has received Cobalt treatments and has incurred large hospital bills. Mr. Annis is semi-retired and the monies he receives from General Cigar are needed so that he can pay his ever increasing medical and hospital bills and to provide for the daily necessities of life for him and his family" (A 74).

As stated in *Widder Bros. Inc.* v. *Kaffee*, 19 A.D. 2d 817, 818, 243 N.Y.S. 2d 601, 603 (1st Dept., 1963):

> "* * * the personal earnings of judgment debtors are exempt (from a restraining notice) except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents * * *."

Further:

> "the reasonable requirements standard implies that the court is not expected to strip the judgment debtor of all of the money he is receiving and leave him with only enough to purchase the bare necessities of life or to maintain a minimum living standard. The debtor's reasonable requirements must be viewed from the perspective of the standard of living that he and his dependents have enjoyed in the past, although the court need not respect every luxury indulged in by the judgment debtor."
>
> Weinstein Korn & Miller, N.Y. Civil Practice, Vol. 6, §5226.13, p. 52-407 (1973).

There was, therefore, an issue of fact presented, as to the Appellant's reasonable requirements, sufficient to require the Court below to order a trial or hearing on that particular issue.

POINT II

The Court Below Erred In Ordering Installment Payments Retroactively From May 1, 1975.

The Court below, in making the order appealed from, erroneously disregarded the law of the case as it itself had established that law, in its opinion dated October 1, 1975 (A 307). The District Court, which had originally enforced the restraining notice issued by the Appellee, reversed itself and found that the restraining notice was invalid; consequently, it denied the Appellee's application for issuance of an execution against the funds accumulated under the invalid restraining notice, holding that the "plaintiff will not be permitted to profit from wrong doing . . ." (A 314). Yet, in the order appealed from, the Court per-

mitted the Appellee to achieve precisely that result by directing the Appellant "to pay on or before October 31, 1975, the aforesaid installment payments for the months of May, June, July, August, September and October, 1975, or an aggregate of $25,523.58 from the sum of $26,041.67, previously accrued by General Cigar, for his benefit, which sum is to be received by him from General Cigar" (A 332). Nowhere in the opinion of the Court below does there appear any discussion or conclusion which would justify requiring the Appellant to make back payments. Yet, by its order of October 30, 1975, the Court below directed the turn-over of the very same fund accumulated by the invalid restraining notice, as to which the Court itself had denied the issuance of execution.

It is respectfully pointed out to the Court that the Appellant was deprived of the use of the General Cigar funds (the sum of $26,041.67) for well over a year. This was a direct result of the restraining notice held by the Court below to have been improperly issued by Appellee to General Cigar (A 316).

The District Court was in error in ordering installment payments retroactive to the date of original application for relief which the Court itself, reversing itself, held to be inappropriate. *Kaufman* v. *Kaufman*, 29 A.D. 2d 922, 289 NYS 2d 23 (1st Dept., 1968) stands for the proposition that installment payment orders should run from the time of entry of the Court's order and not from the date that the original motion is brought on. To provide otherwise would, as a matter of law, cause a severe hardship to the judgment debtor, unless the judgment debtor himself has caused a delay in entry of the order. As the Court stated in *Kaufman*:

> * * * "Furthermore, we find that the delay in the entry of the order was not brought about by defendant, so

that requiring payments to begin as of the date of institution of the proceeding will work a hardship on the defendant and impose a burden he cannot meet." 289 N.Y.S. 2d at 24-25

Consequently, the Court below was in error in directing the defendant-Appellant to make installment payments retroactively commencing from May 1, 1975 rather than from the date of entry of the order, October 30, 1975.

POINT III

The Installment Payment Order is Limited by the Consumer Credit Protection Act, 15 U.S.C. §§ 1671-1677.

The Consumer Credit Protection Act (hereafter CCPA) became effective on enactment on May 29, 1968. Title III—"Restriction on Garnishment" became effective July 1, 1970, and includes sections 301-307. It is codified as Subchapter II "Restrictions on Garnishment," Chapter 41 "Consumer Credit Protection," 15 U.S.C. §§ 1671-1677 (1968).

Under the CCPA, 15 U.S.C. § 1673(a) fixes a maximum amount subject to garnishment of:

"(1) 25 percent of his disposable earnings for that week, * * *"

The leading case dealing with enforcement of the restrictive garnishment provisions of the CCPA is *Hodgson* v. *Cleveland Municipal Court,* 326 F. Supp. 419 (USDC ND Ohio, 1971). In *Hodgson* v. *Cleveland, supra* the United States District Court stated at pp. 429-430:

"This garnishment shield of section 1673(a) is expressly shaped to fit 'any workweek,' and that week's 'dis-

posable earnings.' Use of the week as the unit for computing the maximum of disposable earnings subject to garnishment is a reasonable exercise of legislative power. Congress has determined that weekly wage earners especially need to be protected from excessive garnishment Area wage surveys of the United States Department of Labor, received in evidence, disclose that throughout the country the overwhelming majority of plant workers are paid on a weekly basis, and a majority of office workers are paid on a weekly or bi-weekly basis. Congressional selection of an employee's weekly disposable earnings as the unit for computing his garnishment maximum is made plain in Conf. Rept. No. 1397, 90th Cong.; 2d Sess. p. 2029 (1968). Headed, Title III—Restrictions on Garnishment, the Report states:

> 'No garnishment is allowed which would exceed either 25 percent of disposable earnings, or the amount by which the weekly disposable earnings exceed 30 times the Federal minimum hourly wage, whichever is less.'

This reference further reveals congressional intention to make mandatory the legislated restrictions on garnishment. It is written into law. Section 1673(a) used the phrase 'may not exceed.' Title V—General Provisions of the Consumer Credit Protection Act, Section 503 (not codified in the United States Code), recites 'grammatical usages.' In part, it states:

> The phrase 'may not' is used to indicate that an action is both unauthorized and forbidden."

Accordingly, garnishment procedures should never operate so as to deprive an employee of more than 25 percent

of his disposable earnings paid for any one pay period. *Hodgson* v. *Hamilton Municipal Court*, 349 F. Supp. 1125 (USDC, S.D. Ohio, 1972).

And as this Court stated in *In re Kokoszeka*, 479 F. 2d 990 (2d Cir. 1973), affd. 417 U.S. 462, 94 S. Ct. 2431 (1974), rehearing denied, 419 U.S. 886 (1974), the intent of this section (U.S.C. §1673a) was to make sure that wage earners were able to receive at least 75% of their take home pay in any one pay period so that they would have enough cash to meet basic needs.

Accordingly, in dealing with any installment payment order, the Court below was specifically bound by the 25% federal garnishment limitation on disposable earnings imposed under the CCPA.

According to the United States District Court in *Hodgson* v. *Cleveland Municipal Court, supra*, p. 16:

> "Congress expressly provides that State court orders and process issued in violation of garnishment restrictions of section 1673(a) are 'both unauthorized and forbidden.' It is determined and declared that interlocked section 1673(a) and section 1673(c) federally forbid the making, execution, or enforcement of any State court 'order or process' that violates the restriction on garnishment contained in section 1673(c) or any regulation of the Secretary promulgated as 29 C.F.R. §870.10. Likewise, the effect of any State garnishment law that underlies such offending State court 'order or process' is federally preempted." 326 F. Supp. at 431.

Yet, in its opinion of October 1, 1975 the Court below held that "the installment payment order is not limited by the Federal Garnishment Law contained in 15 USC §§ 1671

thru 1677" (A 327). The Court reasoned in its opinion that an installment payment order is not a "garnishment" within the meaning of CCPA principally because it runs directly to the judgment debtor rather than to a third person (A 327).

Consideration of the background and purpose of the CCPA, however, militates against the Court's conclusion and indicates that Congress did intend to place an installment payment order, similar to the one issued herein, under the protection of the Federal Garnishment Laws. First of all, an installment payment order issued pursuant to CPLR § 5226 easily fits within the federal statutes own definition of "garnishment". USC §1672(c) defines " 'garnishment' as any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt." Nowhere, does the definition indicate that a third party must do the withholding, and would seem to cover an installment payment order where the debtor, himself, is required to withhold sums from his own earnings to contribute to his debt. Also, the use of the term, "earnings", rather than the "wages" or "salary" in the definition can be taken to indicate that profits of a self-employed individual would be protected by the Federal Garnishment Laws.

The argument that "garnishment" under the federal statute is not limited to processes involving a third party is supported by the U.S. District Court's decision in *In re Cedor*, 337 F. Supp. 1103 (N.D. California, 1972), aff'd. 470 F.2d 996 (Ninth Circuit 1972), *cert. denied*, 411 U.S. 973 (1973). That case held that an order to a bankrupt to turn over an income tax refund to the trustee in bankruptcy was a "garnishment" since the refund was traceable to "earnings".

In addition, the Congressional purpose in enacting the garnishment laws dictates that installment payments be included. §1671 sets forth the con ns of Congress in passing the law. §§1671 (a) (1) an (3) show concern over "predatory extensions of credit" and uniformity of the bankruptcy laws.

The most recent case dealing with the Federal Garnishment Laws is *Hodgson* v. *Christopher*, 365 F. Supp. 583 (D. N. Dakota, 1973). This case dealt with a complaint brought on by the Secretary of Labor against the Sheriff of Grand Forks County, North Dakota against two practices employed in said county pursuant to the North Dakota Century Code which were alleged to be violative of the CCPA. In enjoining the Sheriff from enforcing the tw practices in question, in that they were violative of the CCPA, the Court stated as follows:

> "The term garnishment is not restricted but includes any procedure by which earnings of an individual are withheld." 365 F. Supp. at 586.

The Court then went on to state:

> "It would be a misconstruction of the scope and intent of the act were the court to hold otherwise. The Defendants' argument is specious for a very basic reason. It would be comparatively simple for a sheriff to ascertain when an employer issues his payroll checks, or puts cash in pay envelopes. Once the sheriff has discovered the time of payroll issuance, he could avoid the problems and restrictions of the CCPA by simply waiting and levying on the debtor's wages after issuance because then their nature, according to the Defendants, changes to personal property.
>
> An Act of Congress must be construed in the light of common sense consistent with its express purpose

> and intent. The interpretation urged by the Defendants would circumvent the Act in Grand Forks County if the result prohibited under the garnishment statutes could be achieved by simply proceeding under the execution statutes." 365 F. Supp. at 587.

In the same vein, we find it unacceptable to believe that Congress, in enacting the CCPA, acted to protect only those with employers and not the self-employed. The law should not be construed to protect a wage earner but not the proprietor of a grocery store or a photography studio.

In its opinion of October 1, 1975, the Court below found support for its interpretation of the meaning of "garnishment" in the exclusion of installment payment orders from that term as used in Personal Property Law § 46. The Court recognized that the state law definition was not dispositive but felt that it "may be instructive in interpreting the Federal Law" (A 327). However, the §46 definition is a limited one with no general effect on state law and certainly none on federal law. §46 provides in pertinent part:

> "In this article, unless the context or subject matter otherwise requires * * * 8. "Garnishment" shall not include an order for installment payments to a judgment-creditor."

Consequently, the above definition is for use *only* in Personal Property Law Article 3-A, dealing with assignments of earnings, and then only when the context or subject matter does not otherwise require. The fact that the Legislature found it necessary to narrow the definition of "garnishment", by enacting Personal Property Law §46 negatives, rather than supports, the view that the limitation should be given effect outside its own restricted scope.

POINT IV

The Installment Payment Order is Defective Because it is an Absolute Order to Pay Money Not Conditioned on the Receipt of Income.

It has been held that an installment payment order under CPA § 793, the predecessor section to CPLR § 5226, is defective if it orders the judgment-debtor to pay installments absolutely rather than ordering him to pay out of income actually received. *F. E. Compton & Co.* v. *Williams,* 290 NYS 984 (4th Dept., 1936); *Long Island Trust Company* v. *Ross,* 239 NYS 2d 930 (Supreme Court, Nassau County, 1963). For this reason alone, the Court's order of October 30, 1975 is defective and should be modified so as to be expressly conditioned on the receipt of actual income.

In its decision of October 1, 1975, the Court below stated:

> "In meeting his needs, defendant may rely not only on the aforementioned assets, but on an income of $60,000 per year, including the $25,000 compensation from General Cigar and the $35,000 in consulting payments from Master Packaging *which will be deemed to be received* by Annis for purposes of this motion." (Emphasis ours) (A 326)

The order provides that "the defendant-judgment debtor is directed to pay, out of all monies received, to be received or for which he is entitled to receive . . ." (A 331). Since the order directs payment out of monies *entitled* to be received, it is defective. If the appellant received no income because, for example, General Cigar went bankrupt or breached its contract, under the terms of the present order, the Appellant would be required to pay his in-

stallments anyway since he was "entitled" to receive the money even though he never got it.

Furthermore, the Appellant himself testified at his deposition of January 31, 1975 that his payments from Master Packaging had been stopped as of the fall of 1974 (A 128; A 150-151) and as was indicated earlier in this brief, all payments to which Appellant might be entitled from Master Packaging will cease on July 2, 1978.

In *F. E. Compton & Co.* v. *Williams, supra*, p. 22 an installment payment order was modified to provide that payment of the installments be made *only out of income received.* The Court stated:

> "The payments called for by section 793 of the Civil Practice Act are to be made from the income of the judgment debtor. If he has no income, there is no authority in this section to direct him to pay any specified amount to his creditor. The reason for this is clear. If he refuses, or without good reason neglects to make the payments as ordered, he is liable to be punished for contempt of court. If directed to pay the installments out of his income, and he has no income during certain periods, by failing to make his payments on such occasions he does not disobey the mandate of the court, and cannot be punished for contempt." 290 N.Y.S. at 989, 990.

This language was cited and the holding followed in *Long Island Trust Company* v. *Ross, supra*, p. 22.

CONCLUSION

The Order of the Court Below Should be Modified Because:

1. There was not sufficient evidence before the Court below to warrant the granting of its installment payment order.

2. No evidentiary hearing or trial was held to determine the Appellant's ability to meet the requirements for issuance of an installment payment order.

3. The Court below erred in ordering that installment payments be made retroactively.

4. The Court below erred in not limiting its installment payments to the guidelines set forth in the Consumer Credit Protection Act.

5. The order of the Court below is defective because it orders the Appellant to pay installments absolutely rather than out of income actually received.

Respectfully submitted,

RICH, KRINSLY, POSES, KATZ & LILLIENSTEIN
Attorneys for Defendant, Judgment-Debtor, Appellant
99 Park Avenue
New York, New York 10016
(212) 867-7200

NORTON I. KATZ
LESLIE D. CORWIN
Of Counsel

Service of 2 copies of this within
Brief is admitted this
31 day of December 1975

[signature]

ATTORNEYS FOR Plaintiff - Judgment Creditor - Appellee

COPY RECEIVED by hand delivery/~~mail~~
LANKENAU KOVNER & BICKFORD
By Cornelia [signature]
Attorneys for Pltf - Judgment Creditor Appellee
Date: 12/31/75 Time: 3:30 pm